

ABC, Inc.



David Cohen  
General Attorney  
Law & Regulation

December 30, 1998

VIA AIRBORNE EXPRESS

Lawrence M. Noble, Esq.  
Office of General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, DC 20463

Re: MUR 4863

Dear Mr. Noble:

Enclosed for filing please find the response of Sean Hannity, WABC-AM Radio, Inc. and ABC, Inc. to the complaint in the above-referenced matter. Included in support of the response are affidavits from John M. Dolan and Mr. Hannity.

Please stamp and date the additional copy of the filing and return it in the enclosed self-addressed envelope.

If you have any questions regarding this matter, please do not hesitate to contact me at 212-456-7711.

Very truly yours,

A handwritten signature in black ink, appearing to read "David Cohen", with a long horizontal flourish extending to the right.

David Cohen

ABC, Inc.



David Cohen  
General Attorney  
Law & Regulation

December 30, 1998

Lawrence M. Noble, Esq.  
Office of General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, DC 20463

Re: MUR 4863

Dear Mr. Noble:

I write on behalf of Sean Hannity, WABC-AM Radio, Inc. (licensee of radio station WABC (AM)) and ABC, Inc. ("ABC"), in response to a November 16, 1998 complaint (the "Complaint") filed with the Federal Election Commission ("FEC" or the "Commission") by Daniel L. Grant of Towaco, New Jersey.<sup>1</sup>

The Complaint alleges, in substance, three types of violations of the Federal Election Campaign Act of 1971 ("FECA" or the "Act"): a) that unspecified on-air statements made on WABC(AM) by Mr. Hannity, a talk show host, in support of the reelection of Senator Alfonse D'Amato, constituted a prohibited corporate contribution in violation of the Act (the "Advocacy Claims") (§§ 2, 4, 8); b) that Respondents contributed free advertising time to Sen. D'Amato on WABC(AM) (the "Free Time Claims") (§§ 1, 3, 7); and c) that Respondents failed to comply with certain filing and reporting requirements imposed on entities making political contributions (the "Reporting Claims") (§§ 5, 6). The claims are either legally or factually deficient.

The Advocacy Claims are defective on their face because the Act explicitly exempts political commentary by a media entity from its reach. Since WABC(AM) operates as a media entity, not affiliated with any candidate or campaign, the broadcasts complained of — no matter the substance of Mr. Hannity's remarks — are plainly protected by the "media exemption" and not subject to the strictures of the Act.

The Free Time Claims fail because they are false. The candidate advertisements for Mr. D'Amato that were broadcast on WABC(AM) were purchased and paid for by Mr. D'Amato's campaign committee in the ordinary course of business.

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<sup>1</sup>ABC, Inc. (formerly "Capital Cities/ABC, Inc.") is an indirect parent of WABC-AM Radio, Inc. The Walt Disney Company, which is separately filing a response to the Complaint, is the ultimate parent of WABC-AM Radio, Inc. Respondents Hannity, ABC and WABC-AM Radio, Inc. are collectively referred to herein as "WABC(AM)" or "Respondents."

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Finally, the Reporting Claims fail since, simply put, there is nothing to report. As noted, the media exemption removes Respondents' on air statements from the reach of the Act, and no air time was donated to the candidate. Thus, Respondents made no corporate contributions subject to the Act. Accordingly, the FEC should find no "reason to believe" and should summarily dismiss the Complaint.

### **Fact Background**

Sean Hannity is the host of a weekday talk show on WABC(AM) on which the newsworthy and controversial issues of the day are addressed. See Affidavit of Sean Hannity ("Hannity Aff."), ¶ 2, annexed hereto. During the fall of 1998, issues concerning the upcoming November elections were a frequent topic of discussion on Mr. Hannity's show. Id. ¶ 3. At times, Mr. Hannity expressed his views of the candidates running for office, including his preference for incumbent New York Senator Alfonse D'Amato over his Democratic challenger, Charles Schumer. Id.

Not everyone appearing on Mr. Hannity's show agreed with his views. Mr. Hannity's program provided a forum for many guests and callers who expressed contrary opinions and who supported candidates different from those favored by Mr. Hannity. Hannity Aff., ¶ 3. Indeed, the program extended several invitations to the Schumer campaign to make the candidate or a representative available. Id. The offers were never accepted. Id. Ultimately, Mr. Schumer defeated Mr. D'Amato in the New York Senatorial race.

### **Discussion**

#### **The Advocacy Claims**

The Complaint provides no basis for finding a violation of the Act because political commentary is explicitly protected by the Act's "media exemption." The Act prohibits any corporate contributions or expenditures in connection with federal elections. 2 U.S.C. §441b (a). However, in enacting FECA, Congress was careful not to impinge on the rights of a free and vibrant press and thus exempted from the reach of the Act "any news story, commentary or editorial distributed through the facilities of any broadcasting station . . . unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. §431 (9)(B)(I) (emphasis added); see also 11 C.F.R. §100.7 (b) (2) and 100.8 (b)(2) (the term "contribution" does not include "any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station" unless owned or controlled by a political candidate or party).

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The legislative history of the Act makes it plain that "it is not the intent of Congress in [FECA] to limit or burden in any way the first amendment freedoms of the press or of association. [The media exception] assures the unfettered right of the newspapers, television networks, and other media to cover and comment on political campaigns." H.R. Rep No. 93-1239, 93rd Congress, 2d Sess., p. 4 (1974) (emphasis added). In accordance with this Congressional directive, the FEC may scrutinize the substance of a communication solely to discern whether a press entity was conducting a legitimate press function when it disseminated the challenged statement. See FEC v. Phillips Publishing, Inc., 517 F. Supp. 1308, 1312-13 (D.D.C. 1981) (emphasis added); Reader's Digest Association, Inc. v. FEC, 509 F. Supp. 1210, 1214-15 (S.D.N.Y. 1981) (applicability of media exemption turns on "whether the press entity was acting as a press entity" as opposed to "acting in a manner unrelated to its publishing function"); AO 1982-44; AO 1980-109.

Thus, there are only two limitations to application of the media exemption: 1) the media entity must not be owned or controlled by a candidate or political committee, and 2) a media entity must be performing a legitimate press function in publishing the complained of statements.

WABC(AM)'s broadcast facilities are neither owned nor controlled by any political party, political committee, or candidate. See Affidavit of John M. Dolan ("Dolan Aff."), ¶ 2, annexed hereto. Mr. Hannity is not now and was not then affiliated with the D'Amato campaign, nor were the objected to comments authorized by or coordinated with any candidate or campaign. Hannity Aff., ¶ 5. Moreover, Mr. Hannity's employment is not in any way dependent upon the position he takes on this or any other political issue or race. Dolan Aff., ¶¶ 6; Hannity Aff., ¶ 4. Thus, it cannot be disputed that WABC(AM) meets the first condition to invocation of the media exemption.

As to the second limitation, the dispensing of political commentary is a classic example of a "legitimate press function" that falls squarely within the media exemption to the Act. WABC(AM) utilizes a "talk radio" format whereby the host will frequently identify — and, often, opine upon — newsworthy issues likely to engender vigorous debate. Dolan Aff., ¶¶ 3, 5; Hannity Aff. 4. To the extent Mr. Hannity expressed on air his preference for Mr. D'Amato, or for or against any other candidate for office, he did so as part of his job to provide commentary on and seek comment about the political questions of the day. Dolan Aff., ¶¶ 5-7; Hannity Aff., ¶¶ 4-5. To the extent Mr. Hannity had occasion to play on air commercials concerning any candidate or political party, he likewise did so to critique and seek reaction to the ads.<sup>2</sup> Id. Therefore, since Mr. Hannity was

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<sup>2</sup> During the many hours of on-air programming he hosted over the course of the 1998 campaign season, Mr. Hannity played, critiqued and sought comment on commercial segments relating to certain candidates and/or

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engaging in archetypal political commentary, the second limitation on the media exemption is similarly inapplicable.

Indeed, the Commission has explicitly rejected the Complaint's contention that commentary in support of a candidate amounts to an impermissible donation of free air time, even where the media entity encouraged its readers to financially support the candidate. In AO 1980-109, the Commission determined that the a periodical, The Ruff Times, could permissibly "urge [its] subscribers to support [federal] candidates with their votes and with contributions," so long as the media entity did not become a "conduit or intermediary" for donations to the candidate.

Here, in contrast, there is no allegation that Mr. Hannity solicited contributions on behalf of any candidate. (And, as demonstrated by Ruff Times, even had Mr. Hannity done so, there would have been no violation of the Act.) The Complaint simply alleges — without citing any specific statements — that Mr. Hannity announced his preference for a particular candidate, a right guaranteed by the first amendment and recognized by Congress via the "media exemption" to the Act. Thus, the complained of broadcasts clearly constitute protected political commentary and the Commission should find "no reason to believe" any of the Advocacy Claims.

### The Free Time Claims

The Complaint claims that WABC(AM) provided Mr. D'Amato's campaign "free election advertisements" (§ 1), that it "contribute[d] air time" during the "Sean Hannity Show" "for the express purpose of re-electing Senator Alfonse D'Amato," (§ 3), and that it broadcast portions of "a Paid Political advertisement" for Mr. D'Amato which allegedly represented an "in kind contribution" to the D'Amato campaign (§ 7).

The claims are false.<sup>3</sup> During the 1998 campaign season, Mr. Hannity hosted over 100 hours of on-air programming and had occasion to play, critique and seek comment on segments of ads concerning certain candidates and/or political parties, activities plainly covered by the media exemption.<sup>4</sup> However, Respondents did not donate or contribute any commercial air time to Mr.

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political parties. Hannity Aff. ¶ 5. Mr. Hannity does not specifically recall playing any ads sponsored by either Mr. D'Amato's or Mr. Schumer's own political committees (other than any ads placed and paid for in the ordinary course of business). *Id.* Of course, even had Mr. Hannity played the candidates' own ads for purposes of critique or commentary, the media exemption would still compel dismissal of the Complaint.

<sup>3</sup>It bears emphasizing that the Free Time Claims are devoid of detail (except to identify the general time frame as the latter half of October 1998), and completely lacking in substantiation.

<sup>4</sup>See footnote 2, *supra*.

**ABC, Inc.**



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D'Amato for his campaign or for any other purpose; any ads Mr. D'Amato placed on WABC(AM) were paid for by the candidate's campaign committee in the ordinary course of business. Dolan Aff., ¶ 8. Accordingly, the Free Time Claims should be dismissed.

#### The Reporting Claims

Since, as demonstrated above, Respondents have made no corporate contribution subject to the strictures of the Act, there is nothing for Respondents to have reported to the Commission. Therefore, the Reporting Claims — as the Advocacy and Free Time Claims — cannot form the basis of a violation of the Act.

#### Conclusion

The Complaint is both legally and factually deficient. The complained of broadcasts constitute protected political commentary exempt from the Act. Respondents did not donate any commercial air time to any candidate. And, finally, no reporting requirements were triggered. Thus, Respondents made no improper corporate contribution and the Complaint should be summarily dismissed.

Very truly yours,

A handwritten signature in cursive script that reads "David Cohen".

David Cohen

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ELECTION COMMISSION

RE: MUR 4863

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)  
AFFIDAVIT OF  
SEAN HANNITY

COUNTY OF NEW YORK

STATE OF NEW YORK

)  
) ss:  
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SEAN HANNITY, being duly sworn, deposes and says:

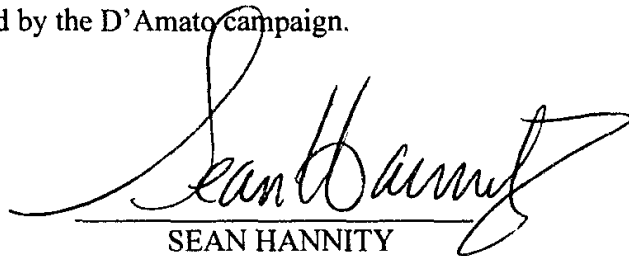
1. I submit this affidavit in support of the reply of WABC(AM) Radio, Inc., licensee of radio station WABC(AM) ("WABC") in New York, ABC, Inc., The Walt Disney Company and myself to the complaint filed with the Federal Election Commission ("FEC") by Daniel L. Grant of Towaro, New Jersey.

2. I am the host of a talk show heard on WABC in New York on weekday afternoons. My show addresses a wide variety of newsworthy issues, with an emphasis on politics and current events.

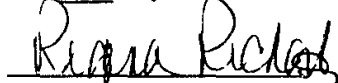
3. During the fall of 1998, I frequently discussed on air the upcoming November elections, including the New York Senatorial race between Alfonse D'Amato and Charles Schumer. At times, I expressed my opinion that Mr. D'Amato was the preferable candidate. Many of my guests and callers expressed a contrary view. My program extended several invitations to the Schumer campaign asking that the candidate or his representative appear on the show. None of the invitations was accepted.

4. Raising issues, expressing opinions and providing commentary regarding the political questions of the day – including the D'Amato-Schumer race – are core components of my job. In doing so, I express my own beliefs and do not act at the behest or instigation of any political candidate or committee. My employment is not in any way affected by the position I take as to any political issue or race.

5. During the 1998 campaign season, I hosted over one hundred hours of on-air programming. During that time, I had occasion to play on air segments of commercials relating to certain candidates and/or political parties, for purposes of offering and seeking comment. I do not specifically recall playing any ads sponsored by either Mr. D'Amato's or Mr. Schumer's own political committees (other than any ads placed and paid for in the ordinary course of business). I am not and have never been affiliated with the D'Amato campaign, nor were the broadcasts at issue in this case in any way coordinated with or authorized by the D'Amato campaign.

  
SEAN HANNITY

Sworn and subscribed to before me  
this 30 day of December, 1998.

  
Notary Public

REGINA RICHARDS  
Notary Public, State of New York  
No. 4954717  
Qualified in Suffolk County  
Commission Expires Aug. 14, 1999

My commission expires: \_\_\_\_\_



UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ELECTION COMMISSION

RE: MUR 4863

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AFFIDAVIT OF  
JOHN M. DOLAN

COUNTY OF NEW YORK

STATE OF NEW YORK

)  
) ss:  
)

JOHN M. DOLAN, being duly sworn, deposes and says:

1. I am President and General Manager of WABC-AM Radio, Inc., licensee of radio station WABC(AM) ("WABC") in New York. I submit this affidavit in support of the reply of Sean Hannity, WABC, ABC, Inc. ("ABC") and The Walt Disney Company ("Disney") to the complaint filed with the Federal Election Commission by Daniel L. Grant of Towaro, New Jersey.

2. WABC-AM Radio, Inc. is a wholly-owned indirect subsidiary of ABC. ABC is a wholly owned indirect subsidiary of Disney. Neither WABC-AM Radio, Inc., ABC nor Disney is owned or controlled by any political party, political committee or political candidate.

3. WABC's format consists largely of news and talk-radio. WABC's talk show hosts offer their commentary and opinions on matters of public concern and invite discussion and debate from callers and guests.

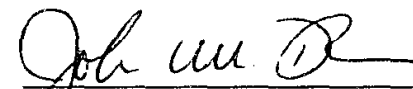
4. The "Sean Hannity Show" is broadcast on WABC on weekdays between the hours of 3 p.m. and 6 p.m. WABC has broadcast Mr. Hannity's talk- radio program since 1996.

5. As part of his program, Mr. Hannity strives to engage his audience with his thought-provoking opinions and commentary on a wide range of topics. During the 1998 campaign season, Mr. Hannity frequently discussed the upcoming elections, including the Senatorial race between Sen. Alfonse D'Amato and Rep. Charles Schumer.

6. WABC permits Sean Hannity and other talk-show hosts to present their own opinions in favor of candidates on their programs. Moreover, Mr. Hannity's employment is not in any way contingent on the nature of the opinions he expresses during his show. WABC does not require that Mr. Hannity (or any other host) obtain management approval for the political views he expresses, nor do those views represent those of WABC or its corporate parents.

7. As a broadcast licensee, WABC-AM Radio, Inc. is obligated, pursuant to Federal Communications Commission rules and policies, to meet the diverse needs and interests of the listeners in its community of license. Station management has determined that the "Sean Hannity Show" — and similar programs, in which the host is given wide discretion to express his personal views in order to foster debate — constitutes one appropriate means to meet its public interest obligations.

8. WABC did not donate or contribute any commercial air time to Mr. D'Amato for his campaign or for any other purpose. Any commercials placed by Mr. D'Amato (or any other candidate) on the station were purchased and paid for by the candidate's campaign committee in the ordinary course of business.

  
JOHN M. DOLAN

Sworn and subscribed to before me  
this 26<sup>th</sup> day of December, 1998.

  
Notary Public

SANDRA E. SIDOTI  
Notary Public, State of New York  
No. 4088679  
Qualified in Westchester County  
Commission expires 4/26/2000

My Commission expires: \_\_\_\_\_